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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RONALD BINKOWSKI,
Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED

The trial judge for the Ingham County Circuit Court entered an order suppressing evidence seized by virtue of a search warrant holding the affidavit insufficient to support a finding of probable cause. The Court of Appeals in an interlocutory appeal reversed the trial judge and the Supreme Court for the State of Michigan denied leave to appeal.

Petitioner filed a demand requesting that the matter be scheduled for a speedy trial and subsequently thereto filed a motion requesting dismissal claiming the delay between his arrest and the commencement of the trial denied him a right to a speedy trial. The questions presented are:

1. Whether an affidavit is sufficient to establish probable cause for the issuance of a search warrant where the only observation of criminal activity which the affiant sets forth in the affidavit is that he observed a third person hand a confidential informant a bindle containing heroin without any information in the affidavit as to the reliability of the third person or where the heroin was obtained, under the Fourth Amendment of the United States Constitution. All other action observed being harmless activity.

2. Whether failure to bring a case to trial for more than 13 months after a demand is made for a speedy trial by the petitioner while the case is on an interlocutory appeal by the People of the State of Michigan and no stay of proceedings was requested and there had already been a delay of months is a denial of a speedy trial under the Sixth Amendment of the United States Constitution.

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PEOPLE OF THE STATE OF MICHIGAN,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

The Petitioner, Ronald Binkowski, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Michigan rendered in these proceedings on October 20, 1980.

OPINIONS BELOW

The basic decision involved in this application in the initial interlocutory order of the Court of Appeals of the State of Michigan which was not reported, and is annexed to this petition in Appendix A, at page 13. The

interlocutory order reversed the opinion of the trial judge of the Ingham County Circuit Court of April 13, 1978 suppressing evidence in this cause. The opinion of the Ingham County Circuit Court was not reported and is annexed to this opinion in Appendix B, at page 14. The Supreme Court of the State of Michigan denied leave to appeal by an order dated January 29, 1979 which was reported at 405 Mich 812 (1979) and is annexed in Appendix C, at page 21.

Following the trial where petitioner was found guilty, an appeal was filed with the Court of Appeals for the State of Michigan. The opinion of the Court of Appeals for the State of Michigan was not reported and is annexed to this petition in Appendix D, at page 22. The order of the Supreme Court for the State of Michigan denying leave to appeal has not been reported and is annexed in Appendix E, infra, page 24.

JURISDICTION

The order of the Supreme Court of the State of Michigan was entered October 20, 1980. See Appendix A, page 13, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . ."

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . ."

Constitution of the United States, Amendment XIV, § 1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF FACTS

The Petitioner was arrested on March 29, 1977 and was, thereafter, released on bail. He was charged with possession of heroin with intent to deliver. His arrest occurred while the place he was residing was being searched pursuant to a search warrant which was issued March 28, 1977 based upon an affidavit signed by Officer David Ruiz of the Lansing Police Department. A quantity of heroin was seized during the search.

The Affidavit

"(1) Affiant is a police officer with the Lansing Police Dept. and has been so employed for two years, for the past ten months your affiant has been assigned to the Tri-County Metro Narcotics Unit as an undercover officer and within said capacity has had occassion (sic) to come to know a confidential informant hereafter referred to as CI. (2) Affiant met with said CI within the last four hours, at that time you (sic) affiant picked up said CI and your affiant and said CI picked up a third person known to your affiant as Vera Childs at that time your affiant, CI and Vera Childs drove to the

above area approximately one and one half blocks away from the above described location. (3) Your affiant on earlier occasions has observed the premises at 514 Catherine, Lansing Township, Ingham, Mich. and known (sic) it to be as located and described above. (4) Affiant and CI remained in affiants (sic) vehicle, before leaving said vehicle affiant provided CI with $50 lawful currency of the United States which said CI was then observed by your affiant to pass said money to Vera Childs and Vera Childs then left the presence of your affiant and said CI in the vehicle and began to walk toward (sic) the area of Catherine Street, Lansing Township. (5) Your affiant had set up a surveilance (sic) procedure with fellow police officers of the Metro Squad in reference to the above transaction, your affiant knows one Sgt. Gene Wriggelsworth to be a fellow police officer and member of the Metro Squad and your affiant was advised by Sgt. Wriggelsworth that Wriggelsworth observed the person of Vera Childs leave affiants (sic) vehicle and walk over to Catherine Street, within a few moments Wriggelsworth observed Vera Childs return from Catherine Street to affiants (sic) vehicle. (6) Your affiant also knows fellow police officer Jim Johnson of the Metro Narcotics Squad who as a part of your affiants (sic) surveilance (sic) set up on Catherine Street and within moments of leaving the affiant, your affiant was advised that officer Johnson observed Vera Childs enter into the premises of 514 Catherine, Lansing Twp. (7) Your affiant further was wired to broadcast the coming and going of Vera Childs and knows both Officer Johnson and Sgt. Wriggelsworth had receivers for said broadcast and both officers related to your affiant that they overhard said broadcasts and observed Vera Childs contemporaneous with said broadcasts. (8) Your affiant upon the return of Vera Childs observed a foil bindle to be transfered (sic)

from said Vera Childs to said CI and said CI then turned over said foil packet to your affiant. Your affiant conducted a field test upon the contents of said packet as he has been taught and obtained a positive reaction for heroin, affiant knows said tests to be reliable as said tests have been confirmed by lab tests on materials tested by your affiant. (9) Your affiant at that time discussed an additional deal for 1/8 of an ounce of heroin to be purchased by your affiant in the same manner as above, said deal to take place at between 12:00 Midnight and 12:30 a.m. on 3/28/77 and 3/29/77. (10) Your affiant has known said CI for approximately one month and worked with said CI to obtain approximately twelve cases involving heroin and cocaine, said CI had additional (sic) provided information confirmed by other sources concerning drug trafficing in the Ingham County area. (11) Your affiant has found on similar raids in the past that such persons at drug premises keep said drugs secreted throughout said premises and upon there (sic) persons in order to easily available (sic) for sale of destruction and yet hidden from the police, visitors and other curous (sic) persons. (12) Your affiant further conferred with Officer Johnson as to the premises at 514 Catherine being that known and described by affiant and the same Officer Johnson saw Vera Childs enter."

The Circumstances of the Delay in Bringing Petitioner to Trial

The petitioner was initially arraigned on March 29, 1977. On March 30, 1977, he filed a motion to supress the evidence alleging the affidavit was insufficient upon which the search warrant was based contrary to the Fourth and Fourteenth Amendments of the United States Constitution.

The motion was argued on May 25, 1977 at which time the Judge took the matter under advisement. The motion was denied by an opinion dated July 27, 1977. On that same date, petitioner was bound over to the Ingham County Circuit Court for trial. Petitioner was arraigned on August 3, 1977 and on that date, petitioner caused to be filed a motion to supress the evidence based upon insufficiency of the affidavit for the search warrant contrary to the Fourth and Fourteenth Amendment of the United States Constitution. The motion was argued before the court on November 23, 1977 at which time the trial judge took the matter under advisement. An opinion was filed by the trial judge on March 1, 1979 finding the affidavit to be an insufficient basis for the issuance of the search warrant and suppressed all evidence seized pursuant thereto.

The People of the State of Michigan filed a claim of appeal, which was the proper procedure to have an interlocutory order reviewed, on March 28, 1978. On April 24, 1978, Petitioner filed a demand requesting that the matter be scheduled for trial forthwith affording him a speedy trial in accordance with his rights as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

An application for leave to appeal to the Michigan Court of Appeals was filed by the People of the State of Michigan on June 8, 1978. No stay of trial proceedings was requested or granted. Petitioner filed a motion to dismiss for denial of a speedy trial on June 9, 1978. An order denying the motion was entered June 30, 1978.

The Michigan Court of Appeals entered an order August 4, 1978 reversing the order of the trial judge supressing the evidence without a written opinion.

Petitioner, thereafter, caused to be filed in the Supreme Court for the State of Michigan an application for leave to appeal requesting immediate consideration.

No request for a stay of trial proceedings was requested or granted.

The Supreme Court of the State of Michigan issued an order on January 29, 1979 granting the motion for immediate consideration, but denied the application for leave to appeal "because the court was not persuaded that the question presented should now be reviewed by the court."

Petitioner filed a motion on February 9, 1979 to quash because there had been an unreasonable delay in bringing this matter on for trial denying the petitioner his rights as provided by the Sixth Amendment of United States Constitution. The motion was denied.

The petitioner proceeded to trial on June 4, 1979 and was convicted of the principal charge before a jury on June 5, 1979. The evidence seized pursuant to the search warrant was admitted over petitioner's objections.

During the time the case was pending in the trial court, petitioner requested an adjournment on two separate occasions, both for a period of one day. One from October 11, 1977. The other from Friday, June 1, 1979 to Monday, June 4, 1979, that being the day the trial actually commenced.

The Defendant was sentenced on the 5th day of July, 1979 to three years probation, a fine of $1,000.00, cost of $500.00, and six months in the Ingham County Jail. The Defendant has remained on bail since that date.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the principles enunciated in the court's *Spinelli* and *Aguilar* rulings.

In *Aguilar* v *Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, this court held that the standard for obtaining a search warrant is "the same under the Fourth and Fourteenth Amendments." The court took great pains to point out that the purpose of the affidavit is to enable the magistrate to "judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause." Conclusions of the complaining officer are not acceptable without supporting information.

The affidavit before this court contains no affirmative allegation that the affiant or the confidential informant questioned the third party, Vera Childs, as to where she obtained the packet which she delivered; it does not indicate whether she was searched to make certain she did not have the packet on her person before she left the automobile; it does not indicate that Vera Childs obtained the packet from the Catherine Street address or even observed heroin on the premises; it contains no allegation that Vera Childs was requested to go to the Catherine Street address to make a purchase of heroin or for any purpose.

The affidavit here contains no affirmative allegation, hearsay or otherwise, that anyone observed heroin on the premises, or that the packet surrendered by Vera Childs came from that address. (*United States* v *Ventresca*, 380 U.S. 102; 13 L. Ed. 2d 684) The magistrate here, as in *Aguilar* v *Texas, supra*, has accepted the complaining officer's "suspicion," "belief" or "mere conclusion," "without question."

In *William Spinelli* v *United States*, 393 U.S. 410, 21 L. Ed. 2d 637, this court held an affidavit for a search warrant must contain reasons supporting that an informant was reliable. While the affidavit in this case gives reasons for finding the confidential informant reliable, there are no allegations as to the reliability of Vera Childs.

There is no question that Vera Childs was the crucial link in the chain to establish probable cause. She was the source of the criminal activity. There is nothing in the affidavit upon which the magistrate could make the crucial decision that there was probable cause to believe the packet of heroin was obtained from the residence of the petitioner rather than on the person of Vera Childs. *Whitley* v *Warden Wyoming State Penitentiary*, 401 U.S. 560; 28 L. Ed. 306 (1971). The affidavit must contain some information upon which the magistrate can conclude that Vera Childs obtained the heroin from petitioner's residence.

Since the complaining officer and the confidential informant relied upon information furnished by Vera Childs does not eliminate the requirement as to the reliability of Vera Childs. While Vera Childs was not named as a confidential informant in the affidavit does not change the requirement as to the reliability of the person making the information available.

The argument that Vera Childs acted contrary to her penal interest, as announced by this court in *United States* v *Harris*, 403 U.S. 573; 29 L. Ed. 2d 723 (1971) is not applicable in this factual situation. In *Harris*, the informant was interviewed by the investigator and had been found to be a prudent person. In this case, there are no allegations that anything was ever discussed with her

or she admitted that she purchased the packet of heroin from the petitioner or at his residence.

The decisions of the Michigan Court of Appeals and the Supreme Court of the State of Michigan cannot be squared with the *Aguilar-Spinelli* requirements. Neither court wrote an opinion setting forth its reasons for reversing the opinion of the trial judge.

2. Whether failure to bring a case to trial for more than 26 months, and the petitioner had filed a demand for a speedy trial after 13 months, during which time the prosecutor took an interlocutory appeal to the Michigan Court of Appeals but no stay was requested or granted and no affirmative showing by the prosecutor that petitioner was not prejudiced by the delay, constitutes a denial of his right to a speedy trial.

The Michigan Court of Appeals refused to consider time spent on appeal in calculating the length of delay. Also, the time petitioner had to wait for a decision from the trial judge on his motion to suppress was not considered.

The trial judge spent over three months before rendering an opinion on the motion to suppress. There was a period of three months from the date of filing the motion to suppress until it was argued before the trial judge. Petitioner contends that the trial judge had an obligation to render a decision promptly to assure that the case would be brought to trial at an early date. [*Barker* v *Wingo*, 407 U.S. 512, 33 L. Ed. 101 (1972)]. It would appear that a delay of some three months in deciding a pre-trial motion is unreasonable and should not be considered as attributable to the petitioner in determining the length of delay in bringing the matter to trial.

After the Michigan Court of Appeals reversed the trial judge suppressing the evidence, there was nothing to prevent this matter from being scheduled for trial. The prosecutor at this point had the right to offer whatever evidence had been seized in at the trial in this matter. Petitioner's application for leave to appeal to the Supreme Court did not in any manner prevent the case from being scheduled for trial. Petitioner had previously demanded that the case be scheduled for an early trial and no stay of proceedings had been requested or granted.

The Michigan Court of Appeals attributed this period of time to the petitioner which involved some five months. There is an obligation upon the State to bring the case to trial, especially following a demand for a speedy trial or show some good reason for such failure. This is consistent with the State's duty to bring the Defendant to trial. (*Barker* v *Wingo, supra*).

The Michigan Supreme Court previously ruled that prejudice is presumed after an 18 month delay. [*People* v *Grimmett*, 388 Mich 590, 202 NW2d 278 (1972); *People* v *Collins*, 388 Mich 660, 202 NW2d 769 (1972); *People* v *Den Uyl*, 320 Mich 488, 31 NW2d 699 (1948)].

The Michigan Court of Appeals stated that the record was devoid of any indication that the Defendant was prejudiced by reason of delay. Petitioner contends that it is a burden due to the length of the delay upon the prosecutor to show affirmatively that the petitioner was not prejudiced by reason of the delay. Petitioner contends that once there has been a showing that there has been an unreasonable delay not caused by or attributable to the petitioner, that it is encumbent upon the prosecutor to show that the petitioner has not been prejudiced due to the delay and absent such a showing,

petitioner must prevail on his contention that he has been denied the right to a speedy trial. [*Strunk* v *United States*, 412 U.S. 434, 37 L. Ed. 2d 56 (1973); *Chism* v *Koehler*, 392 F Supp 659 (1975) Western District of Michigan, Northern Division; *Moore* v *Arizona*, 414 U.S. 25, 38 L. Ed. 2d 183 (1973)].

Petitioner at no time stipulated or agreed to any delay pending the appeal or otherwise. The assertion by petitioner of his right to a speedy trial "is entitled to strong evidentiary weight in determining whether the Defendant is being deprived of the right." *Barker* v *Wingo, supra*, 117.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 13, 1981

APPENDIX A

ORDER OF THE COURT OF APPEALS

(State of Michigan in the Court of Appeals)

(People of the State of Michigan, Plaintiff-Appellant, v Ronald Binkowski and Mary Ann Welch, Defendants-Appellees. No. 78-2307, L.C. # 77-28237-FY)

At A Session Of The Court Of Appeals Of The State Of Michigan, Held at the Court of Appeals in the City of Grand Rapids, on the twenty eighth day of July in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable Daniel F. Walsh Presiding Judge, Robert B. Burns, Glenn S. Allen, Jr., Judges.

In this cause a delayed application for leave to appeal is filed by plaintiff-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED, pursuant to GCR 1963, 806.7, that the Ingham County Circuit Court order of April 13, 1978 which suppressed evidence in this cause be, and the same is hereby REVERSED.

This Court retains no further jurisdiction.

(Certification omitted in printing)

APPENDIX B

OPINION OF THE COURT

(State of Michigan —
Circuit Court — County of Ingham)

(People of the State of Michigan v Ronald Mitchell Binkowski and Mary Ann Welch, Defendants. Docket No. 77 28237 FY; People of the State of Michigan v Mary Ann Welch, Defendant. Docket No. 77 28296 FY)

This matter is before the Court on a motion to suppress brought by Defendants, Ronald Mitchell Binkowski and Mary Ann Welch, on the basis of the insufficiency of the search warrant issued with respect to this matter.

On March 28, 1977, Officer David Ruiz of the Lansing Police Department presented certain statements which had been reduced to writing in affidavit form to a magistrate in support of the issuance of a search warrant. In his affidavit, Officer Ruiz stated he had met with a known and trusted confidential informant during the last four hours and they had picked up one Vera Childs. The three proceeded to within a block or so of a residence at 514 Catherine Street, Lansing Township, Ingham County, where Ruiz handed to the informant $50.00. The informant in turn handed the money to Childs while Ruiz observed. Childs then left the vehicle, proceeded on foot to the residence in question, entered the residence, emerged a few minutes later and returned to the vehicle where she handed the informant a "foil bindle." This bindle was then handed directly to Ruiz who performed a "field test" and made a determination that the substance contained in the bindle was heroin.

Immediately thereafter Ruiz discussed the possibility of purchasing a larger quantity of heroin at the same location and in the same manner. This purchase was to take place between 12:00 midnight and 12:30 a.m. on March 29, 1977.

On the basis of the affidavit, a search warrant was issued whereby authority was given to search for and seize any quantity of heroin and any and all accompanying paraphernalia relating to the packaging, distribution, use and/or selling of heroin. On the basis of the search warrant the police proceeded to the Catherine Street address, executed a search and secure the following: a certain sum of cash, keys, a photograph, a V.I.N. identification, a rental agreement, an insurance notice, dog tags, a driver's license, a lock, Valium, codeine, and heroin.

Following the search two complaints were executed, both resulting in arrest warrants which are the subject matter of the instant litigation. Defendants were charged with possssion with the intent to deliver heroin, and Mary Ann Welch was also charged with possession of Valium and codeine.

Separate proceedings resulted from these charges in which motions were made to suppress the evidence seized due to the alleged insufficiency and defectiveness of the affidavit supporting the search warrant. Differing results were achieved in these lower court proceedings. The People argue that the issue before this Court could not properly have been heard by a court of equal jurisdiction as that of the magistrate authorizing the search warrant. Since this Court may properly review this matter, little would be accomplished by an analysis of that argument, and this Court will proceed to the merits.

Defendants, *inter alia*, assert that the search warrant was improper; that the underlying affidavit was not sufficient to establish the reliability and dependability of the named informant upon whom the affiant relies and, as a result, any and all evidence found through its use is inadmissible; that a search warrant may only issue upon probable cause (MCLA 780.651; MSA 28.1259(1)); that the requisite probable cause is not established by mere conclusions drawn by the affiant or informant without detailing the underlying circumstances (*United States* v *Ventresca*, 380 US 102; 85 S Ct 741; 13 L Ed 2d 684 (1965); that where the underlying affidavit does not provide a sufficient basis for a finding of probable cause, the evidence obtained is inadmissible (*Aguilar* v *Texas*, 378 US 108; 84 S Ct 1509; 12 L Ed 2d 723 (1964)); that prior to the issuance of the search warrant, the issuing magistrate must be furnished sufficient information to support an independent judgment that probable cause exists (*Whiteley* v *Warden, Wyoming State Penitentiary*, 401 US 560; *91* S Ct *1031*; 28 L Ed 2d 306 (1971)); that the affiant or informant must speak with personal knowledge of matters contained in the affidavit; and that the magistrate must be informed of some of the underlying circumstances from which the affiant or informant concluded that narcotics were where he claimed they were and some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable. (*Aguilar, supra; Spinelli* v *United States*, 393 US 410; 89 S Ct 584; 21 L Ed 2d 637 (1969)).

In particular Defendants maintain that the application of the *Aguilar-Spinelli* test for establishing probable cause has not been met because there is nothing in the supporting affidavit to negate the possibility that the

named informant, Vera Childs, may have had the bindle containing heroin on her person prior to entering the residence in question; to indicate that Childs actually said she had purchased the bindle at that address with the money given her by the confidential informant; to indicate Childs was strip searched prior to entering the residence and upon her return, or establish her reliability, dependability or trustworthiness. In essence the thrust of the Defendants' position is that there is nothing in the affidavit to allow for an independent neutral magistrate to find probable cause to believe that there was heroin located at 514 Catherine Street.

The People maintain that the affidavit need only set forth the probability, not a prima facie showing of criminal activity, and in making this determination, the magistrate is not restricted in his use of common sense (*Spinelli, supra*). They assert when an affidavit in support is based solely on heresay from an informant, a two-pronged test is to be utilized. The affidavit must: inform the Court of the source of or nature of the informant's information; and inform the Court of some of the underlying circumstances from which the affiant concluded that the informant was credible or the information reliable (*Aguilar, supra; Spinelli, supra; People* v *Davis*, 72 Mich App 21; 248 NW 2690 (1976)).

The People argue that the second element is met when the magistrate is furnished facts from which the affiant concluded that the informant was credible or that his information was reliable (*Jones* v *United States*, 362 US 257; 4 L Ed 2d 694; 80 S Ct 725 (1960), citing *Draper* v *United States*, 358 US 307; 3 L Ed 2d 327; 79 S Ct 329 (1959)). Argument is presented urging the Court to find the affidavit on its face sufficient, even though there is no statement establishing Child's past reliability for the

reason that there is presented sufficient information which is within the affiant's knowledge to corroborate Child's information, satisfying the second prong of the *Aguilar-Spinelli* test.

The facts which allegedly corroborate the informant's information are the affiant's observations of the known informant, Childs, receiving the money; exiting the automobile; proceeding toward Catherine Street; observations of Childs by two other officers; entry into 514 Catherine and return to the automobile; Childs presenting the confidential informant with the bindle which was then given to the affiant; discussion of a second transaction; and the determination of the contents of the bindle.

The People additionally maintain that the second requirement can be met in another way, in that the actions of Childs were against her penal interest and this alone would give her reliability (*United States* v *Harris*, 403 US 573; 91 S Ct 2075; 29 L Ed 2d 723 (1971); *People* v *Portman*, 73 Mich App 366; 251 NW2d 589 (1977)).

Alternatively, the People argue that the *Aguilar-Spinelli* requirements do not apply for the reason that Childs is not an "informant" but is named and therefore specific allegations of reliability or past reliable contact are unnecessary and that reliability may be deduced from the affidavit (*United States* v *Bell*, 457 F2d 1231 (1972); *United States* v *Unger*, 469 F2d 1283 (1972); *United States* v *Burke*, 17 CRL 2230 (1975)).

Finally, it is contended that the affidavit is premised on personal observations of the affiant, not on information obtained from an informant, and therefore *Aguilar-Spinelli* is inapplicable.

When the *Aguilar-Spinelli* requirements are applied to the statements contained in the affidavit, there appears sufficient information upon which a magistrate could conclude probable cause existed that criminal activity was afoot. However, in the opinion of the Court, the information is not sufficient to enable the reviewing magistrate sufficient basis to determine that the activity stemmed from 514 Catherine Street. The probable cause presented to the magistrate allowed the logical and reasonable conclusion that either the informant Childs, had the heroin on her person prior to entering 514 Catherine or that she obtained the heroin at that address. The underlying circumstances presented in the affidavit, from which the affiant concluded that Childs' information was reliable, also supported the conclusion that she was the source of the criminal activity. In other words, the affidavit presented information upon which probable cause could be found; however, nothing is presented upon which the magistrate could make the crucial decision that the criminal activity existed at 514 Catherine rather than on the person of Childs.

When a magistrate authorizes a search warrant, there must exist probable cause to believe that criminal activity exists in the specific place referred to. The affidavit in support of the search warrant must be sufficient to satisfy the requirements of the Fourth Amendment. The United States Supreme Court in *Spinelli* and *Aguilar* has established requirements by which supporting affidavits are to be tested. In the opinion of the Court, the affidavit in the instant matter has a crippling absence of information upon which the issuing magistrate can determine either that the informant, Childs, was reliable or that her information was reliable. Failing the second requirement of the

Aguilar-Spinelli test the search warrant must fail. The affidavit presented no corroborating information from which one could conclude that the focus of the criminal activity was at 514 Catherine Street.

Childs did supply information against her penal interest. Accepting the proposition that in the proper circumstances this alone may establish an informant's reliability, the Court finds the present situation does not warrant such an application. The penal interest arguments raised in both *United States* v *Harris* and *People* v *Portman* are inapplicable to these facts.

This court recognizes that the informant, Childs, was a named informant, and as such, more credibility was to be given to her information. However, that fact alone does not establish the level of reliability required to justify the issuance of a search warrant. In both *United States* v *Bell* and *United States* v *Unger* the magistrate was presented information in addition to the informant's name which corroborated the statements made. The Court finds neither situation applicable here. Not only are no statements attributed to the only person who was in a position to provide crucial information, in the present situation, the affidavit contains voids where necessary details to establish probable cause are needed. The Court need not even address the issue of statements from a known informant since the affidavit here does not contain such "gap filling" information. In hindsight it may have been easy to provide, but the harsh reality is that the information is lacking, to say nothing of the dearth of information about Childs.

The personal observations of the affiant do not give rise to the finding of probable cause. The only observation of criminal activity which the affiant sets forth is that he observed the informant, Childs, hand the

confidential informant a bindle containing heroin. All other action observed was harmless activity.

In conclusion the Court finds insufficient basis for a finding of probable cause. The search warrant is therefore quashed and all evidence suppressed.

It is so ordered.

/s/ (illegible)
Circuit Judge

Dated: March 1, 1978

APPENDIX C

ORDER GRANTING IMMEDIATE CONSIDERATION AND DENYING LEAVE TO APPEAL

(State of Michigan in the Supreme Court)

(People of the State of Michigan, Plaintiff-Appellee, v Ronald Mitchell Binkowski and Mary Ann Welch, Defendants-Appellants.)

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing on the 29th day of January in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable Mary S. Coleman, Chief Justice, Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the motion by plaintiff-appellee for immediate consideration is considered and it is GRANTED. The delayed application by defendants-appellants for leave to appeal is considered, and it is

DENIED, because the Court is not persuaded that the question presented should now be reviewed by this Court.

(Certification omitted in printing)

APPENDIX D

OPINION OF COURT OF APPEALS

(State of Michigan
Court of Appeals)

(People of the State of Michigan, Plaintiff-Appellee, v Ronald Mitchell Binkowski, Defendant-Appellant. No. 46388)

BEFORE: Kelly, P.J., Walsh and Beasley, JJ.

PER CURIAM

Defendant Ronald Mitchell Binkowski was convicted by a jury of possession with intent to deliver heroin, MCL 335.341; MSA 18.1070(41), since repealed. (See MCL 33.7401; MSA 14.15(7401)). On July 5, 1979, defendant was given a sentence of 36 months probation, fines and costs. The first six months of probation were to be served in the county jail.

Defendant argues that he was denied his right to a speedy trial because of the 26 month delay between his arrest and the commencement of his trial. US Const, AM VI; Const 1963, art 1, § 20. In analyzing defendant's claim we must apply the four-part balancing test of *Barker* v *Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972) (length of delay, reason for delay, assertion of right, prejudice to defendant); *People* v *Grimmett*, 388

Mich 590; 202 NW2d 278 (1972), *People* v *Collins*, 388 Mich 680; 202 NW2d 769 (1972).

Although prejudice is presumed after an 18 month delay, *People* v *Grimmett*, *supra*, 606 *People* v *Den Uyl*, 320 Mich 477; 31 NW2d 699 (1948), the time reasonably spent on appeal must be taken out of the calculation. *People* v *Hammond*, 84 Mich App 60, 67; 269 NW2d 488 (1978), *People* v *Chism*, 390 Mich 104, 113; 211 NW2d 193 (1973). Delay attributable to the defendant or to an aggressive defense cannot support a claim of denial of one's right to a speedy trial. *People* v *Hammond*, *supra*, 67.

In this case, a substantial amount of time was consumed by consideration of defendant's pretrial motions to quash, by the prosecution's appeal to this Court of the circuit court's suppression order, and by defendant's appeal to the Supreme Court of this Court's order reversing the circuit court's suppression order. There were also other pretrial motions filed by defendant. It is clear, therefore, that a substantial part of the delay must be charged to defendant. *People* v *Cutler*, 86 Mich App 118, 126; 272 NW2d 206 (1978), *lv den* 406 Mich 882 (1979). We do not find that the time taken on appeal was excessive.

We also note that the record is devoid of any indication that defendant was prejudiced by reason of the delay. *People* v *Chism*, *supra*, 114. Defendant was incarcerated for only one day and we are presented with no evidence of prejudice to his defense.

In fairness to defendant, we must acknowledge that he asserted his right to a speedy trial, although he did not do so until after the prosecution had instituted appeal proceedings relative to the circuit court's suppression order.

In weighing the four factors, we find no denial of defendant's right to a speedy trial. Defendant was responsible for much of the delay. Both parties reasonably pursued appeals. No prejudice has been shown. Defendant also argues that the affidavit in support of the search warrant for premises described as 514 Catherine Street, Lansing, Michigan, contained insufficient information to support a finding of probable cause justifying issuance of the search warrant. This Court has already passed on this question, adversely to defendant's position, order no. 78-2307 of July 28, 1978, and the Supreme Court denied leave to appeal from our decision, *People* v *Binkowski* and *People* v *Welch*, 405 Mich 812 (1979). The doctrine of "law of the case" precludes further review of the issue by this Court. *Allen* v *Bell Telephone Co*, 61 Mich App 62, 65; 232 NW2d 302 (1975), *lv den* 395 Mich 793 (1975).

Affirmed.

APPENDIX E

ORDER DENYING LEAVE TO APPEAL

(State of Michigan in the Supreme Court)

(People v Ronald Binkowski — SC 65174)

At A Session Of The Supreme Court Of The State Of Michigan Held at the Supreme Court Room in the City of Lansing, on the 20th day of October in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable Mary S. Coleman, Chief Justice, Thomas Giles Kavanagh, G. Mennen Williams, Charles L. Levin, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

People of the State of Michigan, Plaintiff-Appellee, v Ronald Mitchell Binkowski, Defendant-Appellant.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

(Certification omitted in printing)